



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0326

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112513.

The Texas Department of Health (the "department") received a request for certain departmental rules and copies of surveys and corrective plans for Medquest Home Health Care, Inc. ("Medquest"), Lexus Homecare Services ("Lexus"), and Amedisys Home Health ("Amedisys"). You have submitted the records pertaining to Medquest and Amedisys and assert that portions of the records, which you have marked, are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code.¹ Government Code section 552.101 excepts from disclosure information that is made confidential by law, including information made confidential by statute. You have submitted only the requested information pertaining to Medquest and Amedisys to this office for review. As you have not submitted the remainder of the requested information to this office for a decision, it is presumed to be public information unless otherwise made confidential by law. *See Gov't Code §§ 552.301, .302.*

¹The department failed to request an open records decision from this office within ten days of receiving the request for information, a fact that generally results in the presumption that the requested information is presumed public. *See Gov't Code 552.302.* However, because the privacy rights of third parties and the applicability of a confidentiality provision are implicated, these reasons are compelling and sufficient to overcome that presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). Therefore, we will consider your argument that the requested documents are confidential by law.

We observe that the submitted information consists of the state and federal HCFA 2567 statements of deficiencies and plans of correction. First, we will consider the federal HCFA 2567 reports. Federal regulations require the department to release the HCFA 2567 statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. See 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identifies the persons specified in the regulation. We note that the HCFA 2567 forms include roster sheets of patients and personnel. If the enumerated patients and personnel correspond to the numbered patients referenced in the HCFA 2567 statements of deficiencies, then their identities must be withheld in accordance with federal regulation. For those patients who are not referenced in the federal forms, we conclude that their names are not excepted from public disclosure by either common-law privacy or article 4495b of Vernon's Texas Civil Statutes.

Section 552.101 of the Government Code applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See *id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. See Open Records Decision No. 478 (1987). Individual determinations are required. See Open Records Decision No. 370 (1983). Except as stated above, we find that the names of patients and personnel are not protected from disclosure under the common-law right to privacy and must be released.

Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), applies to "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient" and "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." The roster sheets contain neither medical records and communications nor information obtained from those medical records and communications. Thus, you may not withhold the information under section 5.08 of V.T.C.S. article 4495b.

In addition, you state that the department assumes that information in the HCFA 2567 forms obtained from medical records must be withheld pursuant to state laws. You ask whether a patient's diagnosis or medical condition specifically identifies the patient to a certain extent, and thus ask whether the medical information should be redacted from the HCFA 2567 forms. As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release deidentified HCFA 2567 documents. *See* Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. *See English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the deidentification required by federal law is sufficient to protect the privacy interests of the patients.

Next, we will consider the state forms detailing the deficiencies and plans of correction for these home and community support services agencies licensed by the department. Section 142.009 of the Health and Safety Code authorizes the department to conduct investigations regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) of the Health and Safety Code provides:

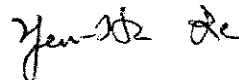
(d) the reports, records, and working papers used or developed in an investigation made under this section are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies deficiencies found without identifying a person, other than the home and community support services agency.

The documents used or developed during a department investigation under chapter 142 are generally confidential with limited exceptions. The submitted state forms fall within the exception provided by subsection (d)(5). Thus, the department must release the state forms after they have been deidentified as required by subsection (d)(5). The state forms also include lists of patients and agency personnel. We refer you to our earlier discussion of how these lists are to be treated.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 112513

Enclosures: Submitted documents

cc: Mr. Marcus Alexander
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(w/o enclosures)